

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB IBS 13-03 Public Records/Money Services Businesses

SPONSOR(S): Insurance & Banking Subcommittee

TIED BILLS: HB 217 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee	13 Y, 0 N	Bauer	Cooper

SUMMARY ANALYSIS

The State of Florida has a long history of providing public access to governmental records and meetings. In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level. In addition to the State Constitution, the Public Records Act, which predates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency. Unless specifically exempted, all agency records are available for public inspection. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge. All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.

This bill creates section 560.312 of the Florida Statutes, a public records exemption for information contained in a payment instrument transaction database that will be created through the passage of House Bill 217, relating to money services businesses. HB 217 requires licensed check cashers to enter transactional information into a statewide database that will be used by regulators and law enforcement to detect and deter financial crimes and workers' compensation fraud. This exemption specifically provides that payment instrument transaction information held by the Office of Financial Regulation (OFR) pursuant to s. 560.310, F.S. which identifies a licensee, payor, payee, or conductor is confidential and exempt from public records disclosure. Protecting the identities of these persons will greatly diminish the ability to misuse personal financial information and sensitive business information contained in the database. The bill also provides for information-sharing agreements between the OFR, the Department of Financial Services, law enforcement agencies, and other governmental agencies, and provides that agencies receiving confidential information from the OFR must maintain the confidentiality of the information, subject to court orders compelling production.

The bill provides for repeal of the exemption on October 2, 2018, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act. As this bill creates a new public records exemption, the bill also provides a statement of public necessity as required by the State Constitution.

The bill provides that the act shall take effect on the same date that if HB 217 or similar legislation is adopted in the same legislative session or an extension thereof and becomes a law.

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new exemption; thus, it appears to require a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records Law

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.¹ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24, of the State Constitution, provides that:

- (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.⁴ Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in

¹ Section 1390, 1391 F.S. (Rev. 1892).

² Fla. Const. art. I, s. 24.

³ Chapter 119, F.S.

⁴ The word "agency" is defined in s. 119.011(2), F.S., to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the State Constitution. *See supra* fn. 3.

⁵ Section 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

the statute.⁸ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁹

Only the Legislature is authorized to create exemptions to open government requirements.¹⁰ Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.¹¹ A bill enacting an exemption¹² may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁵ An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual under this provision.
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.¹⁶

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.¹⁷ The Legislature is only limited in its review process by constitutional requirements.

Payment Instrument Transaction Database

⁸ Florida Attorney General Opinion 85-62.

⁹ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

¹⁰ *Supra* fn. 1.

¹¹ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

¹² Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹³ *Supra* fn. 1.

¹⁴ Section 119.15, F.S.

¹⁵ Section 119.15(6)(b), F.S.

¹⁶ *Id.*

¹⁷ *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

Pending legislation¹⁸ authorizes the Office of Financial Regulation (OFR) to implement a centralized statewide database to gather transactional data from check cashers for checks exceeding \$1,000, corporate payment instruments, and third-party payment instruments.

Implementation of the database is aimed at targeting workers' compensation insurance fraud. In many scenarios, contractors and check cashiers have colluded on a scheme that allows contractors to hide their payroll and obtain workers' compensation coverage without purchasing such coverage. In addition to the workers' compensation fraud, these contractors are avoiding the payment of state and federal taxes. For their participation and risk, check cashers may receive a fee of 7 percent of the value of the check or more for cashing the checks – which exceeds the statutory limit check cashers are allowed to charge.¹⁹

The centralization of the data will allow regulators and law enforcement to effectively target individuals who are engaging in criminal activity. In addition, the centralization of the data will also allow information to be compared on a statewide basis. With the creation of a statewide database, the database would also include personal financial information of those utilizing check cashing services and private business transaction information that is traditionally private.

The bill provides that payment instrument transaction information held by the OFR pursuant to the check cashing requirements of s. 560.310, F.S., which identifies a licensee, payor, payee, or conductor is confidential and exempt from public records disclosure. The bill provides that a licensee may access information that it submits to the office for inclusion in the database. In addition, the bill authorizes the OFR to enter into agreements with the Department of Financial Services, law enforcement agencies, and other governmental agencies in order to share information contained in the database, for purposes of detecting and deterring financial crimes and workers' compensation violations. Such persons receiving confidential information from the OFR must maintain the confidentiality of that information, subject to any court order compelling production of the information.

As indicated in the bill's statement of public necessity, public disclosure of payment instrument transaction information would reveal personal financial information of payees and conductors, such as paycheck amounts. Public disclosure of this transactional information could also leave businesses (payors and licensees) competitively disadvantaged in the marketplace. Protecting the identities of these persons will greatly decrease the ability to misuse personal financial information and sensitive business information.

B. SECTION DIRECTORY:

Section 1 creates s. 560.312, F.S., creating a new public records exemption; providing that information contained in the payment instrument transaction database administered by the OFR is confidential and exempt from public records requirements; providing that a licensee may access information that it administers to OFR for inclusion in the database; providing that OFR may enter into information-sharing agreements with other governmental entities to deter financial crimes and workers' compensation violations; providing that shared information must remain confidential unless compelled by court order; providing future review and repeal pursuant to the Open Government Sunset Review Act.

Section 2 provides a statement of public necessity as required by the State Constitution.

Section 3 provides an effective contingent date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

¹⁸ House Bill 217, 2013 Regular Session.

¹⁹ See Bill Analysis for HB 217, Insurance and Banking Subcommittee, 2013 Regular Session.

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may benefit the private sector. By making the identities of payees and customers confidential, personal financial information will be protected. Similarly, by making the identities of payors and licensees confidential, business information will be protected.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Vote Requirement and Public Necessity Statement for Public Records Bills

In order to pass a newly-created or expanded public records or public meetings exemption, Article I, s. 24 of the State Constitution requires 1) a two-thirds vote of each house of the legislature and 2) a public necessity statement. The bill contains a public necessity statement and will require a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES